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No. 76-353

In the Supreme Court of the United States

OCTOBER TERM, 1976

JEROME DAVID JONÈS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1976. The petition for a writ of certiorari was filed on September 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conduct constituted the transportation of "stolen" property, in violation of 18 U.S.C. 2312 and 2314.

STATUTES INVOLVED

18 U.S.C. 2312 provides:

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. 2314 provides in pertinent part:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *

* * * * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

STATEMENT

After a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted on one count charging interstate transportation of a stolen motor vehicle and one count charging interstate transportation of stolen property in violation of 18 U.S.C. 2312 and 2314. He was sentenced to consecutive three and four year terms of imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

The government's evidence showed that on September 18, 1974, petitioner entered a lease-purchase agreement for a 1973 GMC Astro tractor with the M & J Financial Corporation in Shelby, North Carolina (Tr. 50; Exh. 1). On November 1, 1974, petitioner entered a lease-purchase agreement with M & J Financial Corporation for a tractor and loader backhoe (Tr. 39; Exh. 2). The agreements

provided that petitioner would lease the tractor and backhoe for 36 months at a prescribed monthly rate. During that period, the lessor retained title and complete ownership of the property as well as the right to repossess and sell the equipment upon default by petitioner. Title to the tractor and backhoe were to pass to petitioner upon completion of the rental payments (Tr. 44, 63, 68-69).

In October 1974, while this relation with M & J Financial Corporation existed, petitioner offered to sell the backhoe to John Elms, Jr., the president and principal owner of Apex Equipment Company, Inc., in Greensboro, North Carolina. Petitioner told Elms that he had obtained the backhoe from a customer in exchange for services. On October 25, 1974, petitioner delivered the backhoe to Elms, in exchange for a truck tractor and \$5,500 in cash (Tr. 187-189).¹

Petitioner subsequently offered to sell the Astro tractor to Elms (Tr. 192-193). Elms inspected the vehicle at petitioner's place of business in York, South Carolina on October 30 (Tr. 193-194). The following day Elms agreed to buy the Astro tractor in exchange for two dump trucks and \$9,000 (Tr. 195). Petitioner delivered the Astro tractor to Elms in Greensboro later that day (Tr. 195). Petitioner later gave Elms a fraudulently obtained title for the vehicle (Tr. 147-148, 198-199). At the time of the sales it was Elms' understanding that petitioner owned the backhoe and the tractor (Tr. 199).

Petitioner made two or three payments to M & J Financial Corporation under the lease-purchase agreements

¹Petitioner apparently obtained possession of the backhoe prior to formalizing the lease-purchase agreement with M & J Financial Corporation.

(Tr. 45, 53, 66-67).² Thereafter he defaulted, making no further monthly payments (Tr. 66). M & J was unable to find or repossess the equipment, in which it had invested about \$28,000 (Tr. 66). Approximately two weeks prior to trial, M & J accepted \$12,000 from petitioner in satisfaction of the agreements (Tr. 65-66).

ARGUMENT

Petitioner contends that although title was in the name of M & J, the tractor and backhoe were not "stolen," within the meaning of 18 U.S.C. 2312 and 2314, when his transactions with Elms occurred. He does not deny that the resale deprived M & J of its security interests; rather, by characterizing himself as the "owner" under the lease-sale agreements, petitioner seeks to avoid the terms of Sections 2312 and 2314.

In *United States v. Turley*, 352 U.S. 407, 417, this Court determined that the word "stolen", as used in 18 U.S.C. 2312, is not limited to the definition of common law larceny but includes "all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership."³ Under the lease-purchase agreements petitioner was barred from assigning any rights he had in the equipment without the consent of the lessor, who

²The evidence showed that petitioner was current in his payments until December 1974 (Tr. 66-67). When entering the lease, petitioner prepaid the last three payments for the tractor and the last two payments for the backhoe (Tr. 45, 50; Exhs. 1, 2). Whether petitioner intended at the outset to dispose of the equipment is irrelevant, for the statutes may be violated regardless of when the unlawful intent comes into existence. *Hand v. United States*, 227 F. 2d 794, 796 (C.A. 10); *Collier v. United States*, 190 F. 2d 473, 477 (C.A. 6).

³Petitioner does not contest that the term "stolen" should be construed uniformly for purposes of Section 2314 and Section 2312. See *Lyda v. United States*, 279 F. 2d 461, 464 (C.A. 5).

retained title and the right to repossess upon default. In selling the tractor and backhoe, petitioner in fact deprived the M & J Financial Corporation of the "rights and benefits of ownership" under the lease-purchase agreements and thereby violated both Sections 2312 and 2314.

Petitioner urges, however, that Sections 2312 and 2314 do not apply when conditional sales agreements are breached. While we do not suggest that default alone under a conditional sales agreement would constitute a violation of the statutes (see *Lake v. United States*, 338 F. 2d 787, 789 (C.A. 10)), the surreptitious sale of goods held under such an agreement is an entirely different matter, since it deprives the conditional seller of substantial ownership interests. In light of this Court's construction of the term "stolen" in *Turley*, the deprivation here is sufficient to invoke the provisions of Sections 2312 and 2314, for "the statute[s] may be satisfied with something less than permanency and something less than a deprivation of the totality of ownership." *Schwab v. United States*, 327 F. 2d 11, 13 (C.A. 8); *United States v. Bunch*, 542 F. 2d 629 (C.A. 4) (vehicle possessed under conditional sales agreement held stolen under Section 2312);⁴ *United States v. Pittman*, 441 F. 2d 1098 (C.A. 9) (vehicle possessed under security agreement held stolen under Section 2312); *Lake v. United States*, 338 F. 2d 787 (C.A.

⁴The issue here was decided adversely to petitioner in the *per curiam* opinion of the court of appeals in *Bunch*, *supra*, upon which the court below relied (Pet. App. A). A thorough analysis of the question appears in the opinion of the district court in *Bunch* (399 F. Supp. 1156 (D. Md.)). Petitioner urges (Pet. 12-13) that *Bunch* is inapposite because the defendant there transported the vehicle at the request of the person holding it under a conditional sales agreement. The distinction is irrelevant; the issue was not the identity of the party who transported the vehicle, but whether that act deprived the conditional seller of a sufficient interest under the statute.

10) (vehicle possessed under unfulfilled promise to assume payments on chattel mortgage held stolen under Section 2312); *Smith v. United States*, 233 F. 2d 744 (C.A. 9) (vehicle possessed under conditional sales contract held stolen under Section 2312).⁵ Whether or not the resale of the M & J equipment held under a conditional sales agreement involved the deprivation of a total ownership interest, the deprivation was sufficient to constitute a violation of Sections 2312 and 2314.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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⁵In *Turley, supra*, this Court relied upon *Smith v. United States, supra*, as an example of means by which vehicles may be deemed "stolen" under Section 2312. See 352 U.S. at 416 n. 16.